No. 14-1132

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IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*,
Petitioners,

v.

GREG MANNING, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. SECTION 27 OF THE EXCHANGE ACT EXTENDS FEDERAL JURISDICTION TO ALL SUITS ALLEGING VIOLATIONS OF THE ACT OR SEEKING TO ENFORCE DUTIES CREATED BY THE ACT 4

A. Section 27 Is An Affirmative Grant Of Jurisdiction 4

B. Section 27's Grant Of Exclusive Jurisdiction Is Not Coextensive With Section 1331 5

II. UNIFORMITY IN THE APPLICATION OF THE EXCHANGE ACT IS CRITICAL FOR EFFECTIVE ENFORCEMENT OF THE SECURITIES LAWS AND EFFICIENT ADMINISTRATION OF FINANCIAL MARKETS 8

A. As A Law Governing Market Structure, The Exchange Act Must Be Uniformly Applied 8

B. Uniformity Is Particularly Important For The Effective Regulation Of Naked Short Selling 12

TABLE OF CONTENTS—Continued

Page

C. The Third Circuit's Rule, Which Encourages Artful Pleading, Creates A Substantial Risk Of Inconsistency In The Application Of The Securities Laws 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Page(s)

Adventure Outdoors, Inc. v. *Bloomberg*, 552 F.3d 1290 (11th Cir. 2008) 7

ATSI Communications, Inc. v. *Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007) 12

Ayres v. *General Motors Corp.*, 234 F.3d 514 (11th Cir. 2000) 7

Easton v. *Crossland Mortgage Corp.*, 114 F.3d 979 (9th Cir. 1997) 8

Franchise Tax Board of State of California v. *Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) 6, 7, 9

Grable & Sons Metal Products, Inc. v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) 7

J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 4

Matsushita Electric Industrial Co. v. *Epstein*, 516 U.S. 367 (1996) 9

Merrell Dow Pharmaceuticals Inc. v. *Thompson*, 478 U.S. 804 (1986) 7

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71 (2006) 9

Morrison v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010) 4

Pan American Petroleum Corp. v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Pratt v. *Paris Gas Light & Coke Co.*, 168 U.S. 255 (1897) 6

Rivet v. *Regions Bank of Louisiana*, 522 U.S. 470 (1998) 8

Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979) 4

Whistler Investments, Inc. v. *Depository Trust & Clearing Corp.*, 539 F.3d 1159 (9th Cir. 2008) 12

STATUTES AND REGULATIONS

15 U.S.C.

§ 77v 4
§ 78b 9, 10
§ 78f 9
§ 78j 16
§ 78k-1 10
§ 78*l* 9
§ 78m 9
§ 78o 9
§ 78q 9
§ 78q-1 10
§ 78s 9
§ 78aa 2, 4, 5
§ 78bb 11, 15
§ 80a-43 4
§ 80b-14 4

28 U.S.C. § 1331 ..... 2, 4, 5, 6, 7, 8, 9

TABLE OF AUTHORITIES—Continued

Page(s)

17 C.F.R.
§ 42.203 12
§ 240.15c6-1 13
§ 242.200 12
§ 242.203 13
§ 242.204 12

68 Fed. Reg. 62,972 (Nov. 6, 2003) 12, 14, 15

71 Fed. Reg. 75,068 (Dec. 13, 2006) 14

72 Fed. Reg. 36,348 (July 3, 2007) 14

72 Fed. Reg. 45,544 (Aug. 14, 2007) 14

73 Fed. Reg. 61,690 (Oct. 17, 2008) 14

74 Fed. Reg. 38,266 (July 31, 2009) 14

75 Fed. Reg. 11,232 (Mar. 10, 2010) 14

N.J. Stat. Ann. § 49:3-52.1 17

Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 141 10

OTHER AUTHORITIES

H.R. Conf. Rep. No. 94-229 (1975), *reprinted in* 1975 U.S.C.C.A.N. 321 9

S. Rep. No. 94-75 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179 ..... 10, 11

SEC, Office of Compliance Inspections and Examinations, *Risk Alert* (Aug. 9, 2013), *available at* http://www.sec.gov/about/offices/ocie/options-trading-risk-alert.pdf 13

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

As a business federation representing the interests of all industry sectors, there is a diversity of views among the Chamber's members about how the securities markets should be regulated, including with respect to the short selling practices allegedly at issue in this case. The Chamber has taken the position that short selling is an important activity needed for market liquidity. But the Chamber has also noted its serious concerns with manipulative short-selling tactics and abusive naked short selling, and has supported SEC efforts to curtail these activities.

Of course, to resolve this case this Court need not address whether naked short selling is good or bad, or whether and how it should be regulated. Rather, this Court is confronted only with whether the Securities

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this matter have granted blanket consent for the submission of amicus curiae briefs in support of either or neither party.

Exchange Act (Exchange Act) creates exclusive federal court jurisdiction over state-law claims seeking to enforce standards created by the Act and its implementing regulations. On that score there is no doubt that federal regulations, such as Regulation SHO's restrictions on short selling, should be interpreted and enforced clearly, consistently, and predictably in the federal courts, and not in the state courts. The Third Circuit's decision to the contrary undermines the important goal of uniformity that Congress sought to achieve through section 27's exclusive jurisdiction provision.

The Chamber supports a modern, coherent financial services regulatory system that promotes uniformity and properly separates state and federal roles. The Third Circuit's interpretation of section 27 upsets this delicate federal-state balance, and risks imposing overlapping, contradictory, and duplicative requirements on businesses.

SUMMARY OF ARGUMENT

This Court should reverse the Third Circuit's decision and hold that the scope of federal jurisdiction under section 27 of the Exchange Act is broader than 28 U.S.C. § 1331 "arising under" jurisdiction, encompassing all suits that seek to enforce federal standards created by the Act and regulations thereunder, regardless of whether the claim alleged is one arising under state or federal law.

Section 27 of the Exchange Act is not simply an exclusivity provision, but affirmatively grants federal jurisdiction over both "violations of" the Act or its implementing regulations *and* "suits ... brought to enforce any liability or duty created by" the Act or its implementing regulations. 15 U.S.C. § 78aa(a). Unlike 28

U.S.C. § 1331, section 27 does not focus on whether the claim itself is created by or arises under federal law, but whether the alleged violations and duties underlying any claim are federal. Accordingly, respondents' complaint, which both expressly and by implication alleges violations of the Exchange Act's short selling regulation, Regulation SHO, is subject to federal jurisdiction pursuant to section 27.

Exclusive federal jurisdiction under section 27 advances the Exchange Act's goal of establishing an effective national securities market. The regulation of market structure requires considerable centralization and standardization, which are difficult to achieve without uniform federal-court interpretation and adjudication. The need for uniformity is particularly apparent in the regulation of "naked" short selling, which is embedded in the procedures governing the national system for clearance and settlement of securities transactions. Suits involving allegations of naked short selling necessarily involve interpretation of federal law, and demand considerable judicial expertise that state-court litigation cannot guarantee. The problem of inconsistent state-court application is further exacerbated by the artful pleading the Third Circuit's rule encourages. To avoid section 27's grant of exclusive federal jurisdiction, plaintiffs will not directly raise federal causes of action, but use federal law to inform state standards of care. This indirect approach to applying federal law is sure to create confusion, and risks subjecting market participants to uncertain and conflicting state and federal obligations.

ARGUMENT

I. SECTION 27 OF THE EXCHANGE ACT EXTENDS FEDERAL JURISDICTION TO ALL SUITS ALLEGING VIOLATIONS OF THE ACT OR SEEKING TO ENFORCE DUTIES CREATED BY THE ACT

A. Section 27 Is An Affirmative Grant Of Jurisdiction

Section 27 states that the federal district courts "shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a). Without analysis of the text, the Third Circuit concluded that section 27 is "coextensive" with 28 U.S.C. § 1331, and thus "merely serves to divest state courts of jurisdiction," with no "independent" jurisdictional effect. Pet. App. 22a.

This reading is inconsistent with the plain language of section 27. Consistent with that text, this Court has repeatedly observed over the last 50 years that section 27 is not just an exclusivity provision, but an affirmative grant of jurisdiction. *See, e.g.*, *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

Reference to the jurisdictional provisions of the other securities laws supports this conclusion. The Securities Act of 1933, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 all contain jurisdictional provisions with language nearly identical to that of section 27, except that their jurisdictional grants are not "exclusive." 15 U.S.C. §§ 77v(a), 80a-43, 80b-14. Given the similarity in the language,

these provisions must be interpreted in the same way as section 27. But if the Third Circuit's interpretation of section 27 is applied to them, then they are rendered effectively meaningless—with neither independent jurisdictional effect nor the ability to divest state courts of jurisdiction.

The Court's statement in *Pan American Petroleum Corp.* v. *Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961), that "exclusiveness is ... not the generator of jurisdiction" does not support the Third Circuit's conclusion. *Id.* at 664. *Pan American* states the truism that the scope of exclusivity depends on the scope of the jurisdictional grant. That section 27 grants jurisdiction is unequivocal; the only question is what the scope of that jurisdiction is.

B. Section 27's Grant Of Exclusive Jurisdiction Is Not Coextensive With Section 1331

The starting point for determining the scope of section 27's jurisdictional grant is the text of the provision. Section 27 does not use the same language as 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Section 27 contains two jurisdiction-granting clauses: (1) for "violations of [the Exchange Act] or the rules and regulations thereunder" and (2) for "all suits ... brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a).

The first clause refers simply to "violations" of the Exchange Act and its implementing rules and regulations. No reference is made to any specific cause of action, or whether that cause of action must be created by the federal securities laws. In the absence of such limi-

tation, the natural reading is that a suit premised on a violation of the Act or an implementing rule or regulation would be covered by the plain text of the clause regardless of whether the cause of action is rooted in federal or state law.

The second clause compels a similar reading. Although this clause does refer to "suits" and "actions," it does not require them to be created by or to arise under the Exchange Act. Instead, only the "liability or duty" underpinning the suit or action need be "created by" the Exchange Act. Again, a suit premised on enforcing a liability or duty created under the Act or its implementing rules or regulations would be covered. It is apparent that Congress intended to focus on the underlying violation, not the legal source of the cause of action.[2]

By contrast, courts have interpreted the language of 28 U.S.C. § 1331 as calling for a closer connection between federal law and the plaintiffs' cause of action. Although the phrase "arising under" "has resisted all attempts to frame a single, precise definition," "the most familiar definition ... is Justice Holmes' statement, 'A suit arises under the law that creates the cause of action.'" *Franchise Tax Bd. of State of Cal.* v.

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[2] The Court recognized a similar distinction in *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897), a case on which *Pan American* relied heavily. In holding that the exclusive jurisdiction provision under the Patent Act did not prohibit state courts from resolving "questions" arising under the patent laws, the Court relied on the language of the provision, which only referred to "cases" arising under the patent laws. *Id.* The Court observed: "There is a clear distinction between a case and a *question* arising under the patent laws." *Id.* (emphasis added). Here, the distinction is between a "suit or action" and "liability or duty" created by the Exchange Act. The text only refers to an Exchange Act "liability or duty"; it is not limited to suits or cases, as are the Patent Act and 28 U.S.C. § 1331.

Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8-9 (1983). In limited cases, a suit will also be found to be "arising under" federal law "where the vindication of a right under state law necessarily turned on some construction of federal law." *Id.* at 9.[3]

Section 27 does not require any such causal nexus. Instead of requiring the suit to "arise under" federal law, the text provides that any suit that seeks to determine a federal violation or enforce a federal duty under the Exchange Act would be covered. As a result, section 27 covers, for example, state RICO suits with federal securities law predicates and tort suits premised on violation of federal securities law standards.[4] Here, "[t]here is no question that Plaintiffs assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law" and that "there is no New Jersey analogue to Regulation SHO." Pet. App. 9a. In addition, plaintiff

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[3] *See also Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) ("[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.").

[4] Courts have held that under 28 U.S.C. § 1331, removal of such suits is not always permitted. *See, e.g., Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 805 (1986) (removal improper in negligence suit alleging violation of federal food labeling laws); *Adventure Outdoors, Inc.* v. *Bloomberg*, 552 F.3d 1290, 1298 (11th Cir. 2008) (removal improper in defamation suit requiring determination whether plaintiffs' conduct violated federal gun laws); *Ayres* v. *General Motors Corp.*, 234 F.3d 514, 519 (11th Cir. 2000) (declining to hold "that *every* state RICO cause of action which depends upon proving, as necessary predicate acts, a violation of the federal mail and wire fraud statutes establishes federal question jurisdiction"). But similar suits involving standards set by the Exchange Act would be subject to exclusive federal jurisdiction.

"couches its allegations in language that appears borrowed from Regulation SHO." *Id.* at 8a-9a. Although nominally a purely state case, plaintiffs' claims, in effect, seek enforcement of duties created by the Exchange Act. That is enough to satisfy section 27.[5]

Pan American is not to the contrary. That case simply applies the established principle of the well-pleaded complaint to hold that a federal issue that arises only in defense cannot create federal question jurisdiction. That is of no relevance here, as plaintiffs clearly seek to enforce duties created by Regulation SHO under the Exchange Act.

II. Uniformity In The Application Of The Exchange Act Is Critical For Effective Enforcement Of The Securities Laws And Efficient Administration Of Financial Markets

A. As A Law Governing Market Structure, The Exchange Act Must Be Uniformly Applied

Congress passed section 27 with the objective of "achiev[ing] greater uniformity of construction and more effective and expert application of that law.'"

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[5] Plaintiffs' careful efforts to avoid assertion of a federal claim should make no difference here. Under the "artful pleading" doctrine, removal may be proper "even though no federal question appears on the face of the plaintiff's complaint." *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). This may occur when federal law "completely preempts" the state-law claim, *id.*, or when a state-law claim "omit[s] from the complaint federal law essential to his or her claim," *Easton* v. *Crossland Mortgage Corp.*, 114 F.3d 979, 982 (9th Cir. 1997). Although this doctrine is tailored towards 28 U.S.C. § 1331, the logic applies with particular force to section 27. Application of the "artful pleading" rule ensures that the plaintiff does not engage in a bait-and-switch, minimizing federal issues in the complaint, but ultimately relying on federal violations and duties to establish liability.

Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367, 383 (1996).[6] The uniformity promoted by section 27 is central to achieving the Exchange Act's overarching goal of creating and "insur[ing] the maintenance of fair and honest markets," a goal that requires considerable centralization and standardization if such regulation is to be "reasonably complete and effective." 15 U.S.C. § 78b; *see also Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 78 (2006) ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.").

A coherent national securities market system requires consistent procedures, coordination, and uniform rules to effectively operate. A key component of the Exchange Act's initial framework was the establishment of a uniform national system of registration, *see, e.g.*, 15 U.S.C. §§ 78f, 78*l*, 78o, 78s, and reporting, *see, e.g.*, *id.* §§ 78m, 78q. This standardization helped restore faith in the system after the 1929 stock market crash, and the securities markets "flourished[,] ... provid[ing] a means for millions of Americans to share in the profits of [the] free enterprise system and ... facilitat[ing] the raising of capital by new and growing businesses." H.R. Conf. Rep. No. 94-229, at 91 (1975), *reprinted in* 1975 U.S.C.C.A.N. 321, 322.

The need for uniformity in the national securities laws has only increased over time. In the 1970s, Congress concluded that the securities industry's failure to

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[6] By contrast, courts interpreting 28 U.S.C. § 1331, which covers all areas of federal law, must balance a "welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Franchise Tax Bd.*, 463 U.S. at 8.

adapt to altered economic and technological conditions had resulted in "misallocation of capital, widespread inefficiencies, and undesirable and potentially harmful fragmentation of trading markets." S. Rep. No. 94-75, at 1 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 180. As a result, Congress passed the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 141, which set out to "remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions." *Id.* § 2 (*codified at* 15 U.S.C. § 78b). The "[n]ational market system" would link all national securities markets, "foster[ing] efficiency, enhanc[ing] competition, and increas[ing] the information available" to all market participants. 15 U.S.C. § 78k-1(a)(1)(A)-(D). Likewise, the "[n]ational system for clearance and settlement of securities transactions," would link all clearance and settlement facilities and establish "uniform standards and procedures" to protect investors and reduce unnecessary costs. *Id.* § 78q-1(a)(1)(A)-(D). Congress did not contemplate regulation of these national systems by 50 different states, but charged the SEC with implementing these systems and promulgating regulations to ensure their orderly operation. *Id.* §§ 78k-1(a)(2), 78q-1(a)(2).

Piecemeal state regulation and interpretation risks undermining these national systems. For example, in a 1972 report on the securities industry, the Senate Subcommittee on Securities identified "a lack of uniformity and coordination among the various methods and systems of clearing and settlement," and "found an alarming lack of supervision, coordination, and central decision making which was delaying implementation of many of the technological innovations available to help solve processing problems." S. Rep. No. 94-75, at 54,

reprinted in 1975 U.S.C.C.A.N. at 232. Recognizing the difficulties of implementing a consistent national system, the Subcommittee recommended enacting legislation "prohibiting the imposition of state and local taxes" that were "inhibit[ing] unreasonably the development of an efficient national clearing and depository system." *Id.*; *see* 15 U.S.C. § 78bb(d). For similar reasons, state suits against financial institutions responsible for clearing and settlement would have an inhibiting effect if every procedural violation triggered state liability.

Achieving uniformity can be difficult enough even within the federal system; one of the 1975 amendments to the Exchange Act included "several provisions designed to assure cooperation among, and avoid regulatory duplication by, the several agencies which inspect and enforce compliance by municipal securities dealers." S. Rep. No. 94-75, at 53, *reprinted in* 1975 U.S.C.C.A.N. at 231. Similarly, the Senate Committee recommended that the SEC "serve as the central collection point" for data on institutional investors, in order to ensure that "uniform reporting standards can be established through coordination with other state and federal regulatory agencies to minimize, to the largest extent reasonably possible, the wasted costs and efforts associated with filing multiple reports." *Id.* at 85, *reprinted in* 1975 U.S.C.C.A.N. at 263-264. State suits involving the regulation of market structure would unnecessarily waste resources, further complicate the existing patchwork of regulators, and potentially upset this carefully calibrated scheme.

B. Uniformity Is Particularly Important For The Effective Regulation Of Naked Short Selling

These problems are particularly apparent in the realm of naked short selling.[7] Regulation SHO operates within, and is intimately related to, the national system for clearance and settlement of securities transactions. *See, e.g.*, 68 Fed. Reg. 62,972, 62,977 (Nov. 6, 2003) (Regulation SHO's delivery requirements "would protect and enhance the operation, integrity and stability of the markets and the clearance and settlement system ... by substantially curtailing naked short selling"). Regulation SHO does not establish broad, principles-based standards, but rather provides for detailed and technical rules governing market participants' conduct, including the "marking," 17 C.F.R. § 242.200(g), "locate," *id.* § 42.203(b), and "close-out" requirements, *id.* § 242.204. Accordingly, Regulation SHO sets forth precise num-

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[7] Short selling is "a security trading practice in which a party 'speculates that a particular stock will go down in price and seeks to profit from that drop.'" *Whistler Invs., Inc.* v. *Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1162 (9th Cir. 2008). "The seller sells a security he does not own, borrows the security from a broker to meet the delivery obligation, and then purchases an identical security to return to the broker. If the security has declined in price between the sale and the purchase, the seller profits." *Id.* Short selling can be critical for efficient capital market functioning and development, but can also be used to manipulate and deliberately push down share prices. *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 101 (2d Cir. 2007). "Naked" short selling "occurs when a seller sells a security without owning or borrowing it and does not deliver the security when due." *Whistler Invs.*, 539 F.3d at 1162-1163. Abusive naked short selling undermines investor confidence, deprives shareholders of voting rights, and drives down prices, although under certain circumstances, failures to deliver securities by the settlement date may be an acceptable consequence of legitimate market-making activity. *See* 68 Fed. Reg. 62,972, 62,977 (Nov. 6, 2003).

bers of days within which securities failures to deliver need to be closed out, the procedural consequences of fails to deliver, and numerous exceptions and provisos. *See, e.g.*, 17 C.F.R. § 242.203(b)(3), (3)(i) ("If a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a threshold security for thirteen consecutive settlement days, the participant shall immediately thereafter close out the fail to deliver position by purchasing securities of like kind and quantity[.] ... *Provided, however*, that a participant ... which, prior to the effective date of this amendment, had been previously grandfathered from the close-out requirement in this paragraph (b)(3) ... shall close out that fail to deliver position within thirty-five consecutive settlement days of the effective date of this amendment."). These intricate procedural rules call for consistent and expert adjudication, not ad hoc interpretation by unfamiliar state courts.

What constitutes manipulative behavior depends in part on the SEC rules in place, including the definition of "naked" short sale itself, which is keyed off of the time within which a contract settles, typically three days under Rule 15c6-1. 17 C.F.R. § 240.15c6-1(a). Furthermore, manipulative naked short selling schemes are often designed around existing rules—for example, an investor may try to circumvent the requirements of Regulation SHO by taking advantage of high borrowing costs in hard-to-borrow securities. *See* SEC, Office of Compliance Inspections and Examinations, *Risk Alert* (Aug. 9, 2013).[8] The regulation of short selling is not static; since its passage in 2004, Regulation SHO has been amended five separate

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[8] *Available at* http://www.sec.gov/about/offices/ocie/options-trading-risk-alert.pdf.

times.[9] Even the most experienced state courts will have difficulty ensuring that the alleged theories of fraud remain consistent with these developments.

Any state suit alleging naked short selling, therefore, would necessarily involve interpretation and application of these procedures governing clearance and settlement. If state courts are regularly interpreting such procedures, inconsistencies are bound to arise, undermining the effectiveness of the procedures. An effective short selling procedural regime requires "regulatory simplification and uniformity"; the SEC has noted the importance of avoiding "inconsistent short sale regulation of securities, depending on the market where the securities are trading, and the type of short selling activity." 71 Fed. Reg. 75,068, 75,080 (Dec. 13, 2006). Indeed, "[d]isturbances in settlement processes can affect the stability and integrity of the financial system in general. Clearance and settlement systems are designed to preserve financial integrity and minimize the likelihood of systematic disturbances by instituting risk-management systems." 68 Fed. Reg. 62,972, 62,991 (Nov. 6, 2003).

Not only are markets dependent on consistent procedures, protocols, and rules, but they are highly sensitive to the trust and fears of individual investors. The inconsistent and unpredictable regulation that would result from state court adjudication may provoke market participants into taking matters to their own hands, at the cost of overall market integrity:

> Naked short selling has sparked defensive actions by some issuers designed to combat the

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[9] *See* 72 Fed. Reg. 36,348 (July 3, 2007); 72 Fed. Reg. 45,544 (Aug. 14, 2007); 73 Fed. Reg. 61,690 (Oct. 17, 2008); 74 Fed. Reg. 38,266 (July 31, 2009); 75 Fed. Reg. 11,232 (Mar. 10, 2010).

> potentially negative effects on shareholders, broker-dealers, and the clearance and settlement system. Some issuers have taken actions to attempt to make transfer of their securities "custody only," thus preventing transfer of their stock to or from securities intermediaries such as the Depository Trust Company (DTC) or broker-dealers. A number of issuers have attempted to withdraw their issued securities on deposit at DTC, which makes the securities ineligible for book-entry transfer at a securities depository. Withdrawing securities from DTC or requiring custody-only transfers undermine the goal of a national clearance and settlement system, designed to reduce the physical movement of certificates in the trading markets.

68 Fed. Reg. 62,972, 62,975 (Nov. 6, 2003).

It is no response that Congress contemplated an ongoing role for state blue-sky laws after passing the Exchange Act. *See* 15 U.S.C. § 78bb(a)(1) ("Except as otherwise specifically provided in this title, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations under this chapter."). First, the preservation of jurisdiction for state securities commissioners in section 28 of the Exchange Act applies only to the extent the exercise of that state jurisdiction does not conflict with federal law. Further, section 28 is expressly made subject to other provisions in the Exchange Act, and section 27 makes clear that, even absent a conflict between state and federal law, a state action that relies on federal standards is to be resolved in federal court. When suits are brought in state

court to enforce only state standards created by state law, it is unlikely that section 27 would deprive the state courts of jurisdiction. For example, there may be no need to reference the Exchange Act's general fraud provision, § 10(b), in making out a state law fraud claim. *Id.* § 78j (prohibiting use of "manipulative or deceptive device or contrivance" "in connection with sale of security"). But when a plaintiff does rely on federal standards to prove a state law claim, including a state law fraud claim, section 27 is triggered. Where there is a risk of inconsistent application of federal law, and therefore a risk of undermining regulation of national markets, exclusive jurisdiction is appropriate.

C. The Third Circuit's Rule, Which Encourages Artful Pleading, Creates A Substantial Risk Of Inconsistency In The Application Of The Securities Laws

As discussed above, any state court interpretation of federal standards has the potential to undermine the efficient operation of national market structures. The Third Circuit's rule, however, is particularly likely to lead to disruptive consequences, with the perverse result that section 27's exclusivity provision increases the variance in application of the law.

In cases involving concurrent state-federal jurisdiction, federal law is subject to interpretation by more than 50 different court systems. But the potential for inconsistency is mitigated because every court is applying the same law (albeit under different procedural regimes).

The Third Circuit's regime is more complicated. Because section 27 is exclusive, plaintiffs must avoid pleading federal causes of action in their state court suits. But under the Third Circuit's reading, section 27

would broadly allow injection of federal rules and standards into those state court suits. Like the Exchange Act, state blue-sky laws broadly recognize claims for fraud and manipulation, which can be shown in myriad ways. *See, e.g.*, N.J. Stat. Ann. § 49:3-52.1(a)(5) (a person may not "employ any other deceptive or fraudulent device, scheme, or artifice to manipulate the market in a security"). Given the breadth of such a claim, a plaintiff would have no difficulty couching a federal violation in state terms. Unfortunately, the plaintiff would not be pleading the claim directly. As a result, the state court would be interpreting federal standards, but ultimately applying state law. This poses a serious threat to nationwide consistency; as the Third Circuit noted, New Jersey, for example, "has not shied away from deviating from federal law." Pet. App. 14a. Where federal standards are only indirectly incorporated into state adjudications, securities market participants are all but certain to face unpredictable and inconsistent interpretations of the law. Congress's intent in make section 27 exclusive was not to subject market participants to conflicting state and federal obligations, but to bring a measure of uniformity to the regulation of national securities markets. Accordingly, section 27 must be construed to cover all cases that seek to enforce federal securities law standards.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be reversed.

Respectfully submitted.

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